

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instruction); Hearing Date: 01/02/03; Decision Date: 01/07/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq; Case No.: 5609; **Administrative Review: EDR Ruling requested on 01/21/03; EDR Ruling Date: 02/07/03; Outcome: Request untimely. Request to review denied (EDR Ruling No. 2003-015). Judicial Appeal: Appealed to the Circuit Court in the County of Fairfax on 02/14/03; Outcome: No grounds exist to disturb decision of HO. Appeal is denied (03/21/03)**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5609**

Hearing Date: January 2, 2003  
Decision Issued: January 7, 2003

**PROCEDURAL HISTORY**

On July 25, 2002, Grievant was issued a Group II Written Notice of disciplinary action with five workday suspension for failure to follow supervisor's instructions. Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 11, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 2, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Advocate  
Human Resource Manager  
Manager

**ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as a Toll Operations Supervisor. The purpose of his position includes, "supervision, monitoring, training and evaluations of State and Contract Toll Collectors."<sup>1</sup> Grievant reports to the Operations Manager. Grievant received a Group II Written Notice on March 29, 2001 for failure to follow supervisor's instructions.<sup>2</sup>

Individuals collecting tolls on Virginia highways may be either State employees or employees of contractors providing toll collection services. Grievant monitors the performance of toll collectors working for contractors, but does not directly supervise them on a daily basis. When a contract toll collector performs poorly, Agency managers notify the contractor of the problem. It is the contractor who is responsible for taking disciplinary action against its employee.

The Operations Manager had instructed Grievant not to send emails to the managers of the toll collection contractor without first having those emails reviewed and approved by the Operations Manager. In June 2002, Grievant observed a contract toll collector performing poorly. When Grievant criticized her behavior she became belligerent towards him. Grievant notified the Operations Manager of the problem. The Operations Manager instructed Grievant to draft a email stating the facts giving rise to Grievant's concern and then present the email to the Operations Manager for review. The Operations Manager agreed that the contractor should be informed of the Agency's concern, but he wanted to discuss the issue with the Human Resource Manager. On July 9, 2002, the Operations Manager reviewed Grievant's draft email and then instructed Grievant not to send the email until the Operations Manager had the

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> Agency Exhibit 2.

opportunity to speak with the Human Resource Manager and decide on the best approach. On the following day, Grievant was on sick leave and not at work. When he returned, he sent the email to the contractor's managers without prior approval.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>3</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.<sup>4</sup> Grievant was instructed not to send an email until obtaining approval from the Operations Manager. Grievant sent the email without the Operations Manager's approval thereby failing to follow his supervisor's instructions.

Grievant contends the Operations Manager did not tell him to refrain from sending the email. Grievant contents the Operations Manager's only comments about the draft email were that the contractor's managers would not understand the email. Grievant disagreed with the Operations Manager's observation. The Hearing Officer concludes that the Operations Manager's account of the meeting he had with Grievant is accurate. During that meeting, the Operations Manager stated he wanted to speak with the Human Resource Manager before the draft email was sent. The Human Resource Manager testified that she had a meeting with the Operations Manager during which they discussed what approach the Agency should take to respond to the poor performance of the contract toll collector. If the Operations Manager had authorized Grievant to send the email, it would have been unnecessary for him to speak with the Human Resource Manager. In addition, the Operations Manager confronted Grievant regarding why Grievant sent the email without permission. The Operations Manager's behavior is consistent with having instructed Grievant not to send the email.

## **DECISION**

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM § 1.60(V)(B)(2)(a).

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

### **APPEAL RIGHTS**

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>5</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

